DOCUMENT RESUME

ED 112 496 EA 007 531

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TITLE Student Records -- Open or Confidential.
PUB DATE 22 Feb 75
NOTE 20p.; Paper presented at the Annual Convention of the American Association of School Administrators (107th, Dallas, Texas, February 21-24, 1975)

EDRS PRICE MF-$0.76 HC-$1.58 Plus Postage
DESCRIPTORS *Administrator Guides; *Confidential Records; Definitions; Educational Administration; Educational Legislation; Elementary Secondary Education; *Federal Legislation; Legal Responsibility; Post Secondary Education; *School Law; *Student Records
IDENTIFIERS *Family Education Rights and Privacy Act of 1974

ABSTRACT

This paper provides a detailed discussion of the Family Education Rights and Privacy Act of 1974 and how its various requirements affect educational administrators and other school personnel. With the exception of enforcement provisions, the author examines each of the major areas covered by the act, including access to records, challenges to the content of records, release of records, and notification of parents and students of their rights under the act. In addition, the author devotes considerable space to defining and explaining a number of terms and concepts that are crucial to the proper understanding and administration of the act. (JG)

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STUDENT RECORDS - OPEN OR CONFIDENTIAL

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Presented at
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Dallas, Texas - February 22, 1975

EA 007 531

STUDENT RECORDS – OPEN OR CONFIDENTIAL

The Buckley Family Education Rights and Privacy Act of 1974 resulted from an amendment to the Education Amendments of 1974, and then was further amended, and the new amendments and guidelines were published in the Federal Register on January 6, 1975, with the comment date deadline being on March 7, 1975. This means the regulations will become final after that date so it is not too late to register your complaints to the act should you care to do so.

I am sure all of you are aware that this act will have a profound impact on educators and administrators of our educational institutions as they cope with these regulations, and I suspect some of you have already been introduced to the act in dealing with your students and their parents.

The punishment for not complying with the act is to have your federal funds withheld. The funds in question are only those for programs delegated to the United States Commissioner of Education for administration. Should only the student receive federal funds or aid, this would not mean the institution would then be under this act because the institution itself must receive the funds to be covered by this act. However, not many educational institutions will be able to escape this act because most of them in some way or another receive the tainted funds from the federal government.

In attempting to prepare for this presentation I found it very difficult not to almost copy the act as every part seems important and will in many ways affect

our way of keeping records, so let me urge each of you to read the act and the guidelines several times before formulating any policy to comply with the act.

The act covers all official records, files, and data directly relating to the student. This would cover all records and information kept in the cumulative folder intended for school use or to be available to persons or agencies outside the school setting. As a rule of thumb, I think you must consider all records that are personally identifiable in any way, even social security numbers, etc. One exception would be records kept by a teacher for the teacher's own personal use and kept in that teacher's file and not made a part of the cumulative folder and not released or given to other teachers or third parties. I think you must look at how the records are to be used, and ask whether such use protects the privacy of the student. You should also determine whether or not the records, including the records kept by the individual teacher, are official records relating to that student. For example, if a counselor as part of her duties interviews each child and asks the student about any classroom problems and keeps those records in her personal file, it could be said that these were required to be taken and thus are official records, and even more so if they should be shared with any other person or individual or agency. However, should a student ask to discuss some personal problem with a counselor, and this is not shared with any other school personnel but is kept in the counselor's file for her use in regard to counseling that child, then these records are not covered by the act.

The act basically covers four areas, as follows:

1. Access to records: Hearing and challenge to content of records.
2. Release of records and personally identifiable records.
3. Notice requirements.
4. Enforcement (HEW Secretary will formulate rules and procedures, and this area will not be addressed).

Before discussing the act I think it is important that certain definitions in the act be brought out to enable us to better understand the language of the act.

DEFINITIONS

1. Directory information - means a student's name, address, telephone listing, date and place of birth, major field of study, participation in official, recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

The original act did not have provisions for the use of directory information, and I am sure you can see the problems that could arise without the right to exclude directory information from some mandates of the act. For example, without this provision how would you legally comply with the act in preparing the following:

(a) Honor roll for honor societies

(b) The names of the cast of the senior play

(c) A student directory with name, address, and etc.

(d) A football roster to be placed in a game program

(e) A list of graduating seniors for publication

To me, being able to use this act properly in regard to directory information is of great importance because this allows us to solve many problems in the area of releasing information by proper use of directory information.

2. Educational Institution or Agency -- means any public or private agency or institution that is the recipient of funds under any federal program which the U. S. Commissioner of Education has administrative responsibility as specified by law or by delegation of authority pursuant to law.

3. Eligible Student -- means a student who has attained eighteen years of age or is attending an institution of post-secondary education.

4. Education Records -- mean:

(a) those records, files, documents, and other material that:
(1) contain information directly related to a student, and
(2) are maintained by an educational agency or institution, or by a person acting for an agency or institution.

(b) The term "Education Records" does not include:

(1) Records of institutional, supervisory, and administrative personnel and educational personnel ancillary thereto that are in the sole possession of the maker thereof and that are not accessible or revealed to any person except a substitute. This would answer some of our questions regarding whether or not a teacher or counselor could keep and maintain records, and this would also encourage better use of the records by the teachers and at the same time protect the privacy of the student.

(2) If the personnel of a law enforcement unit do not have access to educational records, then the records and documents of such law enforcement unit that are kept apart from educational records and are maintained solely for law enforcement purposes and are not made available to persons other than law enforcement officials of the same jurisdiction, and these records are not considered educational records.

This should answer some questions asked by security people and campus police. The original act did not have this provision about law enforcement records, and there was much wailing and gnashing of teeth among the public security people and the campus police as they could envision many students prowling around in their records and making demands as to the contents. These are now protected from forced access and challenge if the act is complied with and the records are properly kept.

(3) In the case of persons employed by an educational agency or institution but not in attendance at such institution or agency, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and not available for use by any other purpose are not considered as part of the educational records.

The removing of the above records from the force of the act leaves the employment records of the institution secure from compulsory access and challenge. Some colleges hire many students, and they did not want their personnel records open to some students because of the confidential nature of recommendations and remarks made by supervisors because should these records be subject to inspection by students, persons used as references would not give honest recommendations and supervisory personnel would not give open and honest opinions as to the capabilities and job performance of the students.

(4) Records of a student who is eighteen years of age or older or who is attending an institution of post-secondary education, which are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or para-professional acting in his or her pro-

fessional or para-professional capacity, or assisting in that capacity, and which are created, maintained, or used only in connection with the provision of treatment to the student and are not available to anyone other than persons providing such treatment, provided, however, that such records can be personally reviewed by a physician or other appropriate professional of the student's choice (Does this mean records must be kept by the professional or para-professional to be exempt from the act? The word created appears to be the key word, and such records could be kept in confidential school files).

The inclusion of such records in the non-educational records bracket brought a large sigh of relief from many people because most of these records were obtained through the understanding that they would be kept confidential. A large number of these records were obtained from medical or other professional people and sometime touch on very delicate parent-child relationships. Should these records be included in the act and be open to inspection, then future records would be hard to obtain from medical and other professional people. In many cases parents would not wish to give information that could be open to inspection by the student. We must remember, however that this exception does not apply to records of those students under eighteen and not in a post-secondary school. This act will definitely cause some hinderance in an area where many feel there is a greater need to encourage more information and not less regarding a student under the age of eighteen because there is a greater need for proper treatment and counseling at that level.

5. Institution of Post-Secondary Education -- means an institution which provides education to students beyond the secondary school level. (Secondary school level means the education level not beyond grade 12 at which secondary education is provided as determined under state law).

6. Personally Identifiable -- means that the data or information includes:

   a. the name of a student, the student's parent, or other family member.

   b. the address of the student.

   c. a personal identifier, such as the student's social security number or student number.

   d. a list of personal characteristics which would make it possible to identify the student with reasonable certainty.

7. Record -- means information or data recorded in any medium, including but not limited to: handwriting, print, tapes, film, microfilm, and microfiche.

8. Student -- means any person who is attending an educational institution and [with respect to whom] that [institution] maintains education records or personally identifiable information.

   The term does not include a person who has not been in attendance at such institution. (I believe that if a student is taking a course by correspondence, he would be considered as attending the institution).

It should be noted that the act still recognizes that when a student has attained eighteen years of age or is attending an institution of post-secondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student. This also points out that the act shall not be read to preclude educational institutions from affording the students' rights similiar to those afforded to parents of students under that section. This means, for example, that the institution or school could allow any student to see records, should the institution or school desire to do so. (Parents of a dependent student may still receive records without the student's consent, and the institution may send information to parents without being subject to any penalty).

ACCESS TO RECORDS

The act states, "No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or documents in the education records of a student include information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of the request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made."

The act, however, does make an exception here as to students in institutions of post-secondary education, in that the following records are not required to be made available to the students:

(a) financial records of the parents of the student or any information contained therein.

(b) confidential letters and statements of recommendation which were placed in the educational records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended.

(c) if a student has signed a waiver of the student's right to access under this sub-section. A student or person applying for admission may waive his or her right to have access to confidential statements; however, a student upon request has the right to be given the names of all persons making confidential recommendations, and such waivers may not be required as a condition of admission. Of course, this

raises the question, "What about a blanket consent consisting of a written consent from a parent or eligible student that any and all records requested by certain individuals or certain institutions shall be released to them?"

CHALLENGES TO THE CONTENT OF RECORDS

The act requires each educational agency and institution to provide eligible students and/or parents of students who are under the age of eighteen an opportunity for a hearing wherein challenges can be made to the contents of the student's education reocrds in order to insure that the records are not inaccurate, misleading, or used otherwise in violation of the privacy rights or other rights of the student. The hearing is to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein. Should the student or the parents be refused permission to delete or change any of the records, they have the right to file with such records a written explanation of the parents and/or the eligible student regarding the records. The amendment does not set out a specific procedure to be used; however, it does state that informal proceedings may be used in an attempt to settle a dispute with a parent and/or an eligible student in regard to the records. It also points out that upon request of either party (which means the educational institution or the parent or eligible student), the hearings as required under this act shall be conducted under procedures which have been adopted and published by the institution, school, or agency. The act also sets out that such procedures shall include at least the following elements:

(a) The hearing shall be conducted and decided within a reasonable period of time following the request for the hearing.

(b) The hearing shall be conducted and the decision rendered by an institutional officer or other party who does not have a direct interest in the outcome of the hearing.

(c) The parents or eligible student shall be afforded a full and fair opportunity to present evidence.

(d) The decision shall be rendered in writing within a reasonable period of time after the conclusion of the hearing. (I am sure most schools already have similar systems or vehicles under their "due process" proceedings which could handle a hearing such as this).

It should be pointed out at this time that the act does not require any certain standard in regard to placing information in the file. It deals only with access to the file, so we should all keep in mind that we may place almost anything in the file; however, the act allows the student or the parent access to those files, and they could object to any item in the files. It should also be brought out, too, that the act does not prohibit destruction of records that are in the files that should not be there. However, should the school or institution receive a notice that a parent or eligible student desires to inspect the file, then all records that are in the file should be retained until the parent or eligible student has had an opportunity to see them. So it seems that it would be legally appropriate for schools or institutions to periodically review their record keeping policy and remove or destroy inappropriate or useless data which should not be retained.

The act also instructs that each educational institution, agency, or school shall establish appropriate procedures and methods for granting requests of parents or eligible students to inspect their educational records.

It should be noted that there are different provisions in this act regarding students at post-secondary educational institutions, so care must be made when dealing with requests to determine clearly whether or not the individual making the request is enrolled in a post-secondary educational institution. I might add that if a student is taking a course by correspondence, this would probably be considered being enrolled and attending the institution.

Another question arises, "What about a student who is also an employee of the university or post-secondary educational institution?" It is my belief that the act would allow you to treat his educational records as being open; however, his employee records should be treated like any other employee's records as long as the records are not intermingled, such as, for example, where an individual is working toward a graduate degree and somehow uses his employment record for reference purposes or to show a certain requirement for a degree. If this is done, then those records would also be included as educational records.

RELEASE OF PERSONALLY IDENTIFIABLE RECORDS

This area of the act is probably the most important one for those of us who deal with student records because we have more control over allowing access to the records than we do in the release of information to other institutions and their subsequent use of those records. To me this would be the area of the act which will cause the most difficulties and problems, taking into consideration the many requests that will be received and considering the mandatory provision in the act regarding such information releases, for example:

1. Having to notify parents or eligible student for consent to release information.

2. Required record keeping and transfer of records to requesting parties such as other schools.

3. Must inform all third parties that they cannot release information to others without consent from parent or eligible student.

This act provides that no funds will be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein, other than directory information [as defined in Section 99.3 of the regulations], of students without the written consent of their parents). It has been pointed out that the act, by setting up a category of directory information and allowing its use, has eliminated numerous problems that school officials would face in compiling any list, athletic roster, honor roll, graduation list, play cast list, and etc. However, to legally use or release directory information, the educational agency or institution that is making such list of information (1) shall give public notice of the categories of the information that it has designated with respect to each student attending the institution or agency and (2) shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent. The public notice as to the release of directory information also applies to a student who is eighteen years of age or older, or who is enrolled in a post-secondary institution.

The following are exceptions to the rule requiring the parent's or eligible

student's consent before releasing personally identifiable information or records:

(a) Other school officials, including teachers within the educational institution or local education agency who have been determined to have legitimate education interests.

(b) Officials of other schools or school systems in which the student seeks or attempts to enroll upon the condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record.

(c) Authorized representative of:

1. Comptroller General of the United States
2. The Secretary of Health, Education and Welfare
3. An administrative head of an educational agency as defined in Section 408 (c) of the act
4. State education authorities

(d) In connection with a student's application for receipt of financial aid (regardless of source).

(e) State or local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to state statutes adopted prior to November 19, 1974.

(f) Organizations conducting studies for or on behalf of educational agencies, or for institutions for the purpose of developing, validating, or administering predictive tests, and numerous others; however, all of these studies should be conducted in a manner that will not permit the personal identification of students and their parents by persons other than representatives of such organizations, and that such information will be destroyed when no longer needed for the purpose for which it was conducted.

(g) Crediting organizations in order to carry out their crediting functions.

(h) Exempts or allows records to be sent parents of a student who is a dependent child, or dependent student, as defined in the Internal Revenue Code of 1954.

In other words if a child is a dependent (in most cases he is a dependent

if the parents contribute more than one-half of his support), under this Section (h) information could be sent to such parents and released to such parents without penalty. (This is an important exception because without Section (h) it would impede the school in sending information home, such as grades, attendance records, and other areas of interest to the parent that would be shown on the student's records and reports.

(i) In cases where there is an emergency or the information is needed or is necessary to protect the health or safety of the student or other persons, then it can be released.

It appears also that where the consent of a parent or eligible student is required for the release of educational records, it shall be in writing, must be signed, and dated by the person giving consent, and shall include:

1. A specification of the records to be released
2. The reasons for the release
3. The names of the parties to whom such records will be released.

Where parents are separated or divorced, a written parental consent required under this act may be attained from either parent, subject, of course, to any agreement between such parents or court order governing the rights of students, and in the case of a student whose legal guardian is an institution, a party independent of the institution shall be appointed pursuant to state and local law to give a written parental consent required under this act.

Information may be released in connection with an emergency to protect the health or safety of a student or other persons, and the factors that such educational agencies or institutions should consider in releasing such information are as follows:

(1) the seriousness of a threat to the health or safety of a student or other person

(2) the need for such records to meet such emergency
(3) whether or not the person to whom the records are released is in position to deal with the emergency
(4) the extent to which time is of essence in dealing with the emergency

It appears from the guidelines that the above information will be strictly construed in favor of privacy.

The act requires that educational institutions will not release personally identifiable information of a student except on condition that the party to whom the information is being sent will not permit any other party to have access to such information without the written consent of the parent or eligible student. And it appears that when such information is released, the notice must be given to that party in writing setting out such requirement. Also, when allowing access, another requirement is to keep a record of such release of information. The guidelines require that a record be kept with the educational records of each student which will indicate who requested or obtained access to a student's educational records, and this record must be maintained and should indicate specifically the legitimate interest that each party has in obtaining such information. This records is to be kept with the student's other records and will be made available only to parents or eligible student, and to school officials and their assistants who are responsible for the custody of such records.

NOTIFICATION BY EDUCATIONAL INSTITUTIONS

The act requires that each educational institution to which the act applies and which maintain records on students, shall inform the parents, eligible students and former students of the rights afforded them under this act.

And in meeting these requirements, the notice must be given annually to parents, eligible students and former students. This notice must include the following:

(1) Types of education records and information contained therein which are directly related to students and maintained by the institution.

(2) The name and position of the official responsible for the maintenance of each type of record, the persons who have access to these records, and the purposes for which they have such access.

(3) The policies of the institution for reviewing and expunging these records.

(4) The procedures established by the institution for giving access to records, the right to be provided a list of types of educational records which are maintained by the institution and are directly related to the students, etc.

(In other words, under Section (4), these are the proceedings which have been established by the institution in allowing access to their records, how they are to be given, the cost, and hearings for the right to challenge).

(5) The procedures for challenging the content of educational records.

(6) The cost, if any, which will be charged the parent or eligible student.

(7) The categories of information which the institution has designated directory information (which I touched on before), and

(8) Any other rights and requirements set forth in this act.

This notice must be given to the parent or eligible student in the language of the parent or eligible student. There are many pitfalls possible here concerning just exactly how far we are required to go, of course, the Spanish Americans must be given this notice in Spanish, but what if you have a group of Indians, Germans, Polish, or Chinese, and etc.? This could be very perplexing.

The act requires that any educational institution which receives funds under federal programs covered by this act and makes any of these funds available to any other educational institution whether by sub-grant or contract, and shall require such institution to submit to it an assurance that the institution is in compliance, and will continue to comply, with the provisions of this act. And, of course, each application or proposal submitted to the Commissioner by an educational institution for a grant, or any type of funding, must as a condition to its approval, submit assurance that the educational institution making such application is in compliance and will continue to comply with provisions of this act.

Our generation has witnessed more inventions, progress, and changes than in any other period of time, and much of the credit for these great achievements are due to a large degree to our educational systems and educational institutions.

There are some organizations and individuals today who are working to change our educational process and institutions in order to mold them and the students to their beliefs and way of life. It behooves us, therefore, as educators and administrators, to strive even harder toward the proper education of our youth and to perpetuate those ideals and educational processes that have made our nation and people leaders in this world.

I feel the answer to those who would say that the educational institutions are responsible for the world's many problems is that if this be so, we must also be responsible for the progress and the many great things that we enjoy today.

I have not touched on the enforcement area of this law as I feel the other areas are more important, and with the proper guidance and following of the regulations the enforcement process will not be required in our schools.